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Supreme Court of the United States

OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
Petitioner,

versus

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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Respondent opposes the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in this cause on July 30, 1959.

QUESTIONS PRESENTED[1]

1. In an action under Section 301 (a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for arbitration under limited circumstances, may the District Court determine whether the grievance is one

[1] The questions are here framed differently from those appearing in the petition, pp. 1-2. The decisions below, and, indeed, the petition herein, leave no room for doubt that the basic issue is whether the Court is obliged to determine arbitrarily or whether that is the exclusive function of the arbitrator. That is all the Courts below have decided, in dismissing the demand for arbitration.

which the parties agreed to arbitrate under the language of the contract?

2. Should the findings and conclusions of the Courts below, that the evidence disclosed no agreement by the parties to authorize arbitration of the subject matter covered by the grievance be disturbed?

STATEMENT OF THE CASE

Petitioner, United Steelworkers of America, AFL-CIO, herein called the Union, filed a grievance with respondent, Warrior & Gulf Navigation Company, herein called the Company, alleging violation of the collective bargaining agreement between them by virtue of the contracting out of certain repair work on its equipment while some of the employees were laid off.

The Company transports freight by barge. It first signed an agreement with the Union in 1952. R. 110. During the 12 years of its operation before that, and in all the years since 1952, the Company continuously contracted out maintenance, repair and construction work on its equipment. At no time have the parties agreed that there should be any limitation on the Company's right to do this. In all of these years the Company has continuously had employees on laid off status while such work was being contracted out. The Company has always relied primarily on nearby independent shipyards to do this work for it. The Union, despite layoffs regularly occurring in all the years since its first contract with the Company in 1952, filed no grievance with reference thereto until late in 1958, shortly before this suit was brought; but in the negotiation of prior contracts and of the current contract the Union sought unsuccessfully to negotiate a provision prohibiting the contracting out of repair work. R. 91-94; 96-104; 110-115; 144-145.

The history of the development of the Company's equipment and facilities, and the circumstances of World War II, explain the fluctuation of its mechanical force from a skeleton one, increased through years of construction, fitting and refitting in the Company's own yard, then back to a relatively small one—while all the time it was contracting out work of the same character. Since 1957, on completion of a program of construction and refitting begun after World War II, the Company's mechanical force has been about the size it was when operations were begun in 1940. R. 91-94; 96-104; 116.

The current contract was signed in November 1956. The evidence shows:[2]

Year	Work Contracted Out	Number of Mechanical Employees
1954	$234,000.	50
1955	33,940.	57
1956	37,484.	32
1957	41,162.	24
1958	48,000.	23

The conclusion of its construction and refitting program in the Company's own yard at the end of 1956 led to the reduction in the work force by 8 men; of the total of 24 men remaining in 1957, 5 later retired or quit, and 4 old employees were recalled in 1958. R. 100-102; 103, 128.

In contracting out work, the Company followed the common and necessary practice of sending its engineers and, at times, foremen, to specify and authorize at the outside shipyards the work to be done there, and to check

[2] Since the record is silent on the subject, only conjecture can be employed as to the significance of these figures, and they are presented here solely to give the correct information on the reference thereto made in the petition (p. 4, fn .1); it requires no proof, however, to assert that shipyard repair costs depend on the materials as well as labor, and a $100,000 job can involve very little labor but much engineering skill and the use of special equipment which is available only in certain yards.

periodically on its progress. These representatives of the Company did not supervise men engaged in that work; however, some ex-employees (or employees in laid-off status) may have worked for one or more of these outside shipyards from time to time and chanced to do some work on equipment of the Company in the course of that employment. R. 56-58; 107-108.

The Company's operations are covered throughout by five labor union agreements, three of them with this union. This unionized personnel has increased from 182 when the first contract was signed with the Union in 1952 to a present total of 238. R. 93-95. The supervisory force was not reduced when the mechanical force was cut by 8 men in 1957, because these supervisors direct the work of scores of tow-boat employees, as well. R. 116.

The issues were fully litigated in the trial of the case. The Union insisted upon a full trial, with testimony of witnesses on all points, R. 50, including the testimony of its own witnesses disclosing in detail the Union's attempt and failure to win at the bargaining table, for specific inclusion in the contract, a voice in contracting out repair work, the identical thing which it now asks the Court to read into the contract. R. 140-141; 144-145. The Union has, both expressly and tacitly, over the years, recognized that its contracts did not make this issue arbitrable; by a strained grasping (without tendering proof) at vague possibilties of "discrimination," and equally vague reference to provisions of the contract obviously not pertinent to this question, it seeks the opportunity to gain through an arbitrator that which it well knows and has long demonstrated that it well recognizes to be without the scope of arbitration, simply because it has been unable to obtain that objective in collective bargaining.

REASONS FOR DENYING THE WRIT

1. In the *Lincoln Mills* case,[3] judicial enforcement of contractual arbitration was recognized, and the Courts were left with the responsibility of fashioning the arbitration law to govern when and under what circumstances enforcement was to be ordered.

The guideposts indicated by the Supreme Court in that case have been utilized to some extent in the consideration of the cases falling under the *Lincoln Mills* doctrine, but hardly enough time has elapsed for maturity of the various applicable questions and the jurisprudence thereunder. In general, enforcement of arbitration proceeds apace. These orders have been numerous; the cases in the Federal Courts on the subject have had little effect on the broad scheme of arbitration. The petition makes no showing justifying urgent review of this particular case. *United Steelworkers v. American Mfg. Co.*, 264 F. 2d 624, 6th Cir., 1959, now pending on Petition for Certiorari, No. 360, and *Local 1912, IAM v. U. S. Potash Co.*, 44 LRRM 2861, 10th Cir., 1959, as well as the other cases cited by the Union in support of its petition are sharply distinguishable from the instant proceeding on the contract language, findings and conclusions, as well as the facts and equity. In the *American Mfg. Co.* case the arbitration provision covered "**any** disputes, misunderstandings, differences or grievances arising between the parties," and, moreover, the Court went exhaustively into the evidence to determine that the dispute itself was without merit. In the *U. S. Potash Co.* case there was no showing, by the Union's own witnesses, and no Court finding to the effect that the parties construed the contract to exclude from arbitration

[3] *Textile Workers Union of America v. Lincoln Mills*, 1957, 353 U.S. 448.

the question of contracting out repairs.[4]

2. The essential factor present here is that the Union failed to sustain the burden of showing that the grievance is arbitrable under the contract. The contract forbade arbitration of disputes in certain cases; it did not provide for unqualified arbitration. If the Courts have the authority to compel arbitration, it must be assumed that this authority is to be used to enforce that which the parties have agreed upon. And who is to determine what the parties have agreed upon, if not the Court which must order the parties to comply with that on which they have agreed? Obviously, then, the Courts must construe the agreement. Though there appears to be no disagreement among the Courts over this, the Union argues that arbitrability is a question for the arbitrator, not the Courts. All that was done by the District Court, and the Circuit Court of Appeals, in this case, was to construe the contract to determine arbitrability. Petitioner would have the Supreme Court direct the federal courts to order to arbitration every dispute where it is asserted by a party to a contract that the issue is arbitrable, regardless of all else; or where there is any **possibility,** however remote or unrealistic, that the dispute might be arbitrable in the view of any one human being. As to the latter, who but the Courts is to say that

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[4] The District Court decision, filed July 31, 1958, at Albuquerque, N. M., unreported, in the *U. S. Potash* case, found (Finding No. 7) that the subject of contracting out work had never been discussed in negotiations. But the instant case shows the Union tried in vain to negotiate into the contract a prohibition against the Company's right to contract out repair work. *Cf. Sunnyvale Westinghouse Salaried Employees Association et al v. Westinghouse Electric Corporation*, W.D. Penna., August 18, 1959, 175 F. Supp. 685, and in particular at p. 693; Findings Nos. 36, 37, 47.

The record in the *U. S. Potash* case reveals other important distinctions, such as (1) the language of the "management functions" provision of the labor contract, which expressly excepted "matters of employment" from the company's reservation of exclusive power, and (2) the Potash company's action in bringing in an outside employer to do work with outside personnel on the Potash company's own premises and with the use of some of the Potash company's own facilities.

there is such a possibility? The Union itself brought out in the District Court the evidence of its repeatedly unsuccessful attempts during negotiation of this and previous contracts to obtain that which it now seeks to gain through arbitration; the Union itself disclosed during these proceedings its clear understanding that the agreement foreclosed arbitration to such a management function as contracting out repair work. The contract itself manifests no agreement to arbitrate disputes of this kind. The intent of the parties is clear. The District Court and the Circuit Court of Appeals have said that there cannot be read into the agreement something which is not there. The Courts have the duty to require proof of an agreement to arbitrate this kind of a dispute before ordering arbitration; such proof was conspicuously lacking, and there is, therefore, no warrant for an order of arbitration herein. *American Federation of Technical Engineers v. General Electric Co.*, 1st Cir., 1957, 250 F. (2d) 922, cert. den., 356 U.S. 938; *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Union*, 1st Cir., 1958, 258 F. (2d) 516; *Engineers Assn. v. Sperry*, 2nd Cir., 1957, 251 F. (2d) 133; *Lodge No. 12, Int. Assn. of Machinists v. Cameron Iron Works*, 5th Cir., 1958, 257 F. (2d) 922, cert. den., 79 S. Ct. 120, and, especially, cases cited therein; *International Union, UAW v. Benton Harbor Malleable Industries*, 6th Cir., 1957, 242 F. (2d) 536. The *Cameron Iron Works* case relied on the *General Electrict* case of the First Circuit, above cited, which the Supreme Court had declined to review, where at 250 F. (2d) 922, 929-930, it was stressed that the plaintiff had the burden of proving arbitrability to the **Court**, and that the **Court**, "before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term"

of the contract. In the *Sperry* case, *supra*, the Second Circuit reached the same conclusion, 251 F. (2d) 133, 137, holding that the difference between the Court and arbitration proceedings on arbitrability and the merits, respectively, "is in the quantum of proof necessary for the moving party to obtain relief. * * * Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim." The record here discloses no evidence whatever in support of the Union's claim, but is overwhelmingly destructive of that claim. The principle enunciated in the cases here cited is without conflict in any Circuit. It is the principle applicable here, and the only one applied by the District Court and the Circuit Court of Appeals below.

The petition for the writ of certiorari should be denied, and for this respondent prays.

Respectfully submitted this 6th day of November, 1959.

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PROOF OF SERVICE

I, Richard C. Keenan, one of the attorneys for Warrior & Gulf Navigation Company, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1959, I served copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the petitioner, the other party hereto, by mailing copies in duly addressed envelopes, with first class certified air mail postage prepaid, to its attorneys of record, as follows:

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